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FULL FAITH AND CREDIT TO BE GIVEN TO STATUTES OF OTHER STATES.

Our attention has been called to a rather bold criticism by our contemporary, the Illinois Law Review, of the argument of the court in the comparatively recent case of Fauntleroy v. Lum, 28 Sup. Ct. 641. Our contemporary's criticism, contained in 3 Ill. Law Rev. 181, contains the suggestion, overlooked apparently by both the majority and the minority of the court as well as counsel on either side, that the full faith and credit clause binds a state to enforce the statutes of a sister state on the same ground on which it upholds the judgment of courts foreign to their jurisdiction.

Leaving out of view the fact that this suggestion does not seem to have impressed any member of the court or counsel on either side, which fact in itself would cast some reflection upon its soundness as a rule of law, we are inclined to believe our contemporary has too emphatically stated a proposition of law which, to say the most for it, has only a very doubtful existence. For, indeed, the whole course of judicial decision and congressional construction is against the view that statutes of a state are on a par with judicial decisions in the credit to be given to them in other states.

In the first place congress in 1790, in passing the legislation, which carried into effect article IV., section 1, of the constitution, deliberately made a distinction between statutes and decisions, providing merely for the authentication of the former while for the latter they provided that, when authenticated, the "records and judicial proceedings (of state courts) shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

So, also, have the decisions of the supreme court been averse to giving full effect to that provision of the article referred to, which requires full faith and credit to be given to the "public acts" of a state. Doubt has even been expressed whether statutes and "public acts" are synonymous. Minnesota v. Northern Securities Co., 194 U. S. 48. Thus, it has been held that a state is not bound to recognize the law of another state, even when stipulated in a contract, where the evident intent is an evasion of the law of the forum. National, etc., Loan Association v. Brahan, 193 U. S. 635. And the supreme court has distinctly held, that when a statute of a foreign state has been proven "as a fact" the court of the forum is at liberty to put its own construction upon it and that "if a state court should hold that no cause of action is set forth, and that it is against the public policy of the state to permit an action for such a purpose, we should generally hold that there was no federal question involved in such determination." Finney v. Guy, 189 U. S. 335, 340. At all events, where the case turns upon the construction and not the validity of the foreign statute, a decision of that question is not necessarily of a federal character. Johnson v. New York Life Insurance Co., 187 U. S. 491, 496.

The argument in favor of giving a general statute of a foreign state full faith and credit to the extent of enforcing it whenever the courts of the forum may be called upon to do so, is subject to the objection that a statute, unlike a decision on some question of fact, does not present an actual

concrete situation for recognition but a general rule of law or public policy more or less indefinite as to its meaning and sometimes offensive to the policy of the state of the forum. To give all such statutes of all the states universal force and effect throughout the country to the same extent as judgments, duly determined on the presentment of particular issues of fact, would be intolerable. An evidence of what would be one effect of such a construction is presented in the case of Bonaparte v. Tax Court, 104 U. S. 592, where it was sought, unsuccessfully, to compel a state by reason of the full faith and credit clause to recognize the statute of another state exempting the latter's bonds from taxation, where the bonds were registered in the foreign state and interest and principal payable there. Article four of the constitution, therefore, even if applicable to statutes, certainly does not operate to give to them extra-territorial force and is hardly anything more than an injunction that proof of such statutes shall be received in evidence when authenticated in proper form and given such effect as the court of the forum in its discretion and under its construction of its meaning, may decide to give it.

Moreover, recent decisions of the supreme court have held that a state by statute may shut out from litigants of its own or other states absolutely all right to sue in its courts under the statutes of foreign states, on causes of action not arising within its jurisdiction, and that such a prohibition does not deny such statutes full faith and credit, under the meaning of article IV., section 1, of the constitution. Chambers v. B. & O. Ry. Co., 207 U. S. 142; St. Louis, etc., Ry. Co. v. Taylor, 28 Sup. Ct. 616.

The only case where it is distinctly held that the "public acts" of a foreign state must be given full faith and credit in the state of the forum is the case of Chicago & Alton Ry. Co. v. Wiggins Ferry Co., 119 U. S. 615, but in that case the "public act" in controversy was not a general law but a special act incorporating the Chicago & Alton Railroad. We offer the suggestion that the term "public acts" could be very reasonably restricted to such special legislation, as acts of incorporation or allowance of special claims, etc., which are definite as to their meaning, and are in the nature of legislative findings on questions of fact and thus far partake of the character of judgments. In the early days of the republic such special legislation was very frequent and is it unreasonable to suppose that this was the nature of the "public acts" which the framers of the constitution desired to protect under the Full Faith and Credit Clause?

NOTES OF IMPORTANT DECISIONS.

LANDLORD AND TENANT—ADOPTION OF PROHIBITION AS AFFECTING USE OF PREMISES LEASED FOR SALOON PURPOSES.—The great wave of prohibition which has been sweeping over our country the last two years, is, like all other dynamic social movements of this character, becoming responsible for many other questions as to the application of the law to many new and strange conditions.

One of these new questions is presented in the recent case of Lawrence v. White (Ga.), 63 S. E. 631. In this case lessee rented premises for a term of years for a bar-room and billiard hall. Subsequently Georgia voted for prohibition and the lessee could not continue the business for which the premises were expressly rented, and sued the lessor for an abatement of the rent. He was denied a recovery on the ground that the interposition of the law did not constitute an eviction and that further, the mere use of the word "bar" in the lease did not constitute a covenant or warranty by the lessor that the law would continue to allow the tenant to sell liquor.

The first ground of the decision is clearly correct on principle. It is a well settled rule of law that where the leased premises are removed, repaired, or the rights or privileges of the lessee therein abridged by the public authorities, there is no eviction by the landlord, for which he can be held liable. 24 Cyc. 1133; McLarren v. Spalding, 2 Cal. 510; Hitchcock v. Bacon, 118 Pa. St. 272; Fleming v. King, 100 Ga. 449, 28 S. E. 239; Miller v. Maguire, 18 R. I. 770, 30 Atl. 966.

It would seem equally clear that on the second ground also there could be no recovery.

Certainly, the mere use of a term describing the use to which the premises may be put cannot be considered as a warranty that the law will not interfere with such use.

Nor does such a condition absolve the lessee from the obligation to pay rent. In Abadie v. Berges, 41 La. Ann. 281, 6 So. 592, it was held that where there is no express warranty against the "acts of the law," lessee is not relieved from his obligation to pay rent because of the enactment of the law by which he is deprived of the use of the premises on Sunday. So also in the case of Kerley v. Mayer, 10 Misc. (N. Y.) 718, 31 N. Y. Supp. 818, it was held that an ordinance forbidding a sale of liquor within two hundred feet of a church, passed after the execution of a lease for saloon purposes of premises coming within the inhibitions of the law, did not release a lessee from liability for rent, as he is not by such ordinance deprived of all beneficial use of the property.

We should advise attorneys in drawing up leases to provide for the release of the tenant's obligation in the event the state by statute or other proceeding destroys the use for which the particular premises are rented. And we think it would be an act of fairness on the part of prohibition advocates in the legislatures of those states where prohibition is in force to provide for the release of the tenant of saloon premises from further liability for rent where the law takes away the entire beneficial use of the premises for which it was originally leased.

EMINENT DOMAIN UNDER THE EARLY MILL ACTS AND MODERN ELECTRICAL AND WATER POWER ACTS.

It is a fundamental principle in American constitutional law, that private property can be taken by the state or by authority derived from it, for public purposes only. A legislative act authorizing the taking of property for any private purpose, is of no validity,[1] and the power of determining what is, and what is not, a public purpose is vested in the courts. The property owner is not concluded by an act of the legislature authorizing the condemnation of his land if he can show to the satisfaction of the court, that the purpose for which condemnation was authorized is not a public purpose. It has, however, been well said that there is no such thing as drawing a clear and definite line of distinction between purposes of a public and those of a private nature. "Public and private interests are so commingled in many cases that it is difficult to determine which predominate."

This difficulty is met with in a variety of cases, but nowhere is it more perplexing than in the cases arising under the so-called mill acts, and the modern electrical and water power acts.

The Early Mill Acts—Originated in the Necessities of the Colonists.—The mill acts originated in early colonial days. They were enacted in Virginia, as early as 1667, in Massachusetts, in 1714, in Rhode Island, in 1734, and in Maryland, in 1718.[2] At that time neither steam nor electricity had been harnessed for the service of man. Water power and wind were the only forces of nature, which men had undertaken to utilize in driving machinery. The ancient handicrafts were still important factors in manufacturing, and added to the burdens of domestic toil. But the grist-mill had from time immemorial been operated by water and the swiftly running rivers of New England soon became a valuable factor in providing food for the colonists. But as a head of water could not be obtained at one point in a stream without interfering with the natural flow above and below the dam the erection of mills and mill dams naturally led to disputes between adjacent riparian owners. Under the common law an interference of this kind was a trespass, and by its continuance became a nuisance. The owner whose land was flowed had a right to abate the nuisance, by removing

(1) An exception has apparently been made to this rule in Colorado, the constitution of that state expressly specifying certain purposes which it denominates private purposes for which the power of eminent domain may be exercised. See Denver Power & Irrigation Company v. Colorado and Southern Railway Company, 60 L. R. A. 383. It is, however, at least doubtful whether a taking for a strictly private purpose would be "due process of law" within the meaning of the Federal Constitution.

(2) See note to Head v. Amoskeag Mfg. Co., 113 U. S. 9, 28 L. ed. 893, where the most important of the statutes are collected.

the dam.[3] Hence legislation became necessary in order to protect the mill owner's interests and the interests of those who found his mill a convenience if not a necessity. The early legislative acts seem frequently to have been confined in their application to grist mills,[4] authorizing the owners of such mills to flow the lands of the upper riparian owner, paying damages therefor assessed by a jury. The miller was by statute obliged as a rule to grind for toll, and to serve all patrons alike. For this reason his mill was sometimes said to be for the use of the public, and this public use was regarded as the basis of the statute permitting him to flow the land above him as an exercise of the power of eminent domain.

The Narrow View—Public Use as a Use Controlled and Regulated by the Public.—This view of what constituted the basis of the right of flowage was taken by the Tennessee court in the case of Harding v. Goodlet,[5] which was a petition to condemn land for a grist mill, saw mill and paper mill pursuant to a statute passed in 1777, authorizing a taking for the purpose of erecting a water grist mill. The statute was upheld on the ground that a grist mill is a public mill and the miller a public servant. But the petition was denied for the reason that it asked a condemnation of land for purposes that were not public, namely for a saw mill and paper mill. The court said: "The petitioners say they are desirous to build a grist mill, saw mill and paper mill..... The saw mill and paper mill have no public character. The erection of these mills would be wholly for the private use of these petitioners. To take Harding's land for such use would be unconstitutional. The act of 1777 contemplates no such violation of the rights of one man for the private benefit of another. Had the application been confined to the saw mill and the paper mill no one could for a moment hesitate in rejecting it. Does the introduction of the grist mill thereby asking the land for these complicated purposes alter the case. In my opinion the application is entitled to no more weight than if nothing were said about the grist mill. If an application of this sort were granted, a like application for the introduction of iron works, or any other establishment requiring water power might be made, and would be entitled to equal favor, provided the applicant, as a pretext were to associate a grist mill with his other works. Thus the grist mill, the only thing mentioned in the act of assembly as having any claim to be of a public character, would be made the subterfuge for vesting in one citizen the land of another, and of giving to the whole establishment, of which it would be but an inconsiderate appendage, the high appellation of a public mill. This would be mocking the citizen, who would thus be despoiled of his land to enrich another." In Michigan a statute giving the right of flowage to water power mill owners generally and making no provision for their regulation by law, was held unconstitutional as authorizing the taking of private property for a private purpose.[6] In holding thus, the court took occasion to remark that: "If the act were limited in its scope to manufactures which are of local necessity, as grist mills are in a new country not yet penetrated by railroads, the question would be somewhat different from what it is now. But even in such case it would be essential that the statute should require the use to be public in fact; in other words that it should contain provisions entitling the public to accommodations." In discussing this question many of the courts quote the passage from Constitutional Limitations, by Judge Cooley, in which he defines a public use as follows: "Nor could it be of importance that the public would receive incidental benefits, such as usually spring from the establishment of pros-

(3) Winchell v. Clark, 68 Mich. 64; Hall v. City of Ionia, 38 Mich. 498.

(4) Harding v. Goodlet, 3 Yerg. 41, 24 Am. Dec. 546; Blair v. County of Cuming, 111 U. S. 363, 28 L. ed. 457; Head v. Amoskeag Mfg. Co., 113 U. S. 9, 28 L. ed. 893.

(5) 3 Yerg. 41, 24 Am. Dec. 546.

(6) Ryerson v. Brown, 35 Mich. 332. See also Tyler v. Beacher, 44 Vt. 648; Loughbridge v. Harris, 42 Ga. 500.

perous..... private enterprises. The public use implies a possession, occupation and enjoyment by the public at large, or by public agencies; and a due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to the owner on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it."[7] Never theless

The Broader View—That a Public Benefit Constitutes a Public Use, Within the Meaning of the Law of Eminent Domain —seems to be supported by a majority of the early decisions. Judge Cooley himself in another place refers with approval to these decisions, intimating that eminent domain might be exercised in behalf of certain enterprises when it would be incompetent to aid the same enterprises by payment from the public treasury. "An illustration is the case of lands appropriated for the purpose of creating a reservoir for water, by means of which a water power may be made available in private hands for manufacturing purposes. The right to make the appropriation has been sustained, on the ground that, within the meaning of the law of eminent domain, land is taken for the public use whenever its taking is for the general public advantage, and that the establishment of power for manufacturing purposes is an object of such great public interest—especially where manufacturing is one of the great industrial pursuits of the commonwealth—as fully to justify the declaring it a public use, and to authorize for the purpose the appropriation of private property by individuals or corporations."[8]

In Massachusetts the mill acts were considered as applying to all classes of mills.[9] They were first enacted in 1714, and their justification seems always to have been placed on the ground they tended to develop the manufacturing interests of the commonwealth and thus subserve the general welfare. In Hazen v. Essex County (1853) 12 Cush. 475, the declared purposes of the defendant corporation were among other things to develop a water power to be used for mechanical and manufacturing purposes. The court said: "The establishment of a great mill power for manufacturing purposes as an object of great public interest, especially since manufacturing has come to be one of the great public indus-

(7) Cooley Constitutional Limitations, 6th ed. p. 653. It would seem that in New York, the constitutionality of the Mill Acts has been denied. Hay v. Cohoes, 3 Barb. 42; Varick v. Smith, 5 Page, 137, 28 Am. Dec. 417. The courts of Alabama and Vermont have held that the right of eminent domain cannot be exercised in favor of grist mills unless they are public mills, required by law to grind for all in due turn and for regular tolls. Sadler v. Langham, 34 Ala. 311; Tyler v. Beacher, 44 Vt. 648. "Public use means the same as use by the public." Lewis Eminent Domain, 165. In Healy Lumber Co. v. Morris, 63 L. R. A. 825, the Washington court referring to the doctrine that "public use" should be construed to mean the same thing as "public benefit," said: "It seems scarcely necessary to particularize to show to what extent this doctrine might practically be carried. Under such liberal construction the brewer might successfully demand condemnation of his neighbor's land for the purpose of the erection of a brewery, because, forsooth, many citizens of the state are profitably engaged in the cultivation of hops. Condemnation would be in order for grist mills and for factories, for manufacturing the cereals of the state because there is a large agricultural interest to be sustained. Tanneries, woolen factories, oil refineries, distilleries, packing houses and machine shops of almost every conceivable kind would be entitled to some consideration for the same reasons, thereby destroying any distinctions between public and private use." Traver v. Merrie, 14 Neb. 327. Steam grist mill, if regulated, is also regarded as a public mill. Burlington v. Beasley, 94 U. S. 310, approved in Blair v. Cumming, 111 U. S. 363, 28 L. ed. 460.

(8) In support of this proposition, Judge Cooley cites the following cases: Hazen v. Essex Co., 12 Cush. 475; Great Falls Mfg. Co. v. Fernald, 47 N. H. 444; Fiske v. Farmington Mfg. Co., 12 Pick. 67; Boston & R. Mill Corp. v. Newman, 12 Pick. 467; Harding v. Goodlet, 3 Yerg 41; Newcomb v. Smith, 1 Chand. 71; Thein v. Voegtlander, 3 Wis. 461; Pratt v. Brown, 3 Wis. 603; Fisher v. Horicon, 10 Wis. 351; Curtis v. Whipple, 24 Wis. 350. In the last two cases the court sustained its previous rulings with some hesitation. See also note of Judge Redfield to Allen v. Inhabitants of Jay, 12 Am. L. Reg. 493; Olmstead v. Camp, 33 Conn. 532; Jordan v. Woodward, 40 Me. 317; Miller v. Troost, 14 Minn. 365; Venard v. Cross, 8 Kan. 248; Harding v. Funk, 8 Kan. 315; Burgess v. Clark, 13 Ired. 109; M'Afee's Heirs v. Kennedy, 1 Litt. 92; Smith v. Connelly, 1 T. B. Monr. 58; Shackleford v. Coffey, 4 J. J. Marsh. 40; Crenshaw v. Slate River Co., 6 Rand. 245; Ash v. Cumming, 50 N. H. 591; Hankins v. Lawrence, 8 Blackf. 266; Gammel v. Potter, 6 Ia. 548; Head v. Amoskeag Mfg. Co., 113 U. S. 9; Cooley Tax, 3rd ed. 193.

(9) Head v. Amoskeag Mfg. Co., 113 U. S. 9, 28 L. ed. 889.

trial pursuits of the commonwealth, seems to have been regarded by the legislature and sanctioned by the jurisprudence of the commonwealth, and in our judgment rightly so in determining what is a public use, justifying the exercise of the right of eminent domain." Again the same court in the case of Talbot v. Hudson,[10] declared that, "everything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of inhabitants of a section of the state, or which leads to the growth of towns and the creation of new sources for the employment of capital and labor, indirectly contributes to the general welfare and to the prosperity of the whole community." The court, at the same time referred to the mill acts as examples of a public use, which justified the exercise of the power of eminent domain.[11]

Protest Against the View that Public Use is Equivalent to Public Benefit, in the Law of Eminent Domain.—But in their later decisions most of the courts that adopted the view that a public benefit was a public use sufficient to justify a taking of private property have expressed a doubt as to the soundness of this doctrine. Thus the Maine court declared: "The statute pushes the power of eminent domain to the verge of constitutional inhibition."[12] And the Minnesota court, "the statute goes to the extreme limit of legislative power."[13] So also the Wisconsin court,[14] and New Hampshire.[15] In Massachusetts while the acts regulating flowage in behalf of mills generally have been sustained, the later decisions have been upon the theory that flowage did not constitute a taking within the meaning of the law of eminent domain.[16] This view was apparently approved by the United States Supreme Court, in Head v. Amoskeag, etc., 113 U. S. 9, 28 L. Ed. 889, although the court expressly refrained from deciding the point, saying: "The question whether the erection and maintenance of mills for manufacturing purposes under a general mill act, of which any owner of land upon a stream not navigable may avail himself at will, can be upheld as a taking, by delegation of the right of eminent domain, of private property for public use, in the constitutional sense, is so important and far reaching, that it does not become this court, to express an opinion upon it, when not required for the determination of the rights of the parties before it." It would seem however, that the court had previously decided that the mill acts did provide for a taking in the constitutional sense under the power of eminent domain. See Pumpelly v. G. B. & M. Canal Co., 80 U. S. 166, 20 L. Ed. 557. And Massachusetts is the only state in which it has been held otherwise.[17]

Modern Electrical and Water Power Acts—Implication that Public Control Impresses a Business With Public Use.—Modern electrical and water power acts have not differed very materially in their principal features from the mill acts. (We refer now to those that grant the right of eminent domain to corporations). They have been prolific in litigation, and have prolonged the controversy that divided the courts in connection with the mill acts. The view, however, that the public purpose for which property can be taken must be a purpose which involves a use by the public, and a governmental control and regulation has gained a decided ascendancy.[18]

(10) 16 Gray, 417.

(11) Other cases to like effect are as follows: Fiske v. Farmington, 12 Pick. 68; Veazie v. Dwinel, 50 Me. 479; Aldrich v. Tuscumbia, C. & D. R. Co., 2 Stew & P. (Ala.), 199, 23 Am. Dec. 307; Todd v. Austin, 34 Conn. 78; Hand Gold Min. Co. v. Parker, 59 Ga. 419; Traver v. Merrick Co., 14 Neb. 327; Scuder v. Trenton, Del., Falls Co., 1 N. J. Eq. 694, 23 Am. Dec. 756.

(12) Jordan v. Woodward, 40 Me. 317.

(13) Miller v. Troost, 14 Minn. 365.

(14) Fisher v. Horicon, etc., 10 Wis. 351.

(15) Great Falls Mfg. v. Fernald, 47 N. H. 444; Ash v. Cummings, 50 N. H. 592; Amoskeag Mfg. Co. v. Worchester, 60 N. H. 522.

(16) Williams v. Nelson, 23 Pick. 141; French v. Mfg. Co., 23 Pick. 216; Bates v. Iron Co., 8 Cush. 548; Carey v. Daniels, 8 Met. 466; Murdock v. Stickney, 8 Cush. 113; Gould v. Duck Co., 13 Gray, 442; Lowell v. Boston, 111 Mass. 464; Turner v. Nye, 154 Mass. 579, 14 L. R. A. 488.

(17) See Avery v. Vermont Elect. Co., 59 L. R. A. 818.

(18) This view has been adopted by nearly all the courts which, as we have seen, protested against the doctrine that public purpose is syn-

The question is suggested whether a reservation of a right to the public to use the property to be taken by the corporation upon prescribed terms and without discrimination would of itself render a delegation of the power of eminent domain to such corporation constitutional. That such a reservation would meet the constitutional requirements of most of the state constitutions is clearly implied by the language of the courts. Where the only thing essential to a valid taking is that it be for a "public purpose," then, of course, whatever renders the purpose "public" also renders the taking valid. Nearly all the decisions seem to have turned upon this point. The decisive question has been: Is the purpose for which the legislature has authorized land to be condemned, a public one? An affirmative answer to this question has almost invariably resulted in sustaining the act; and in every case where public control has been reserved, so far as the writer's investigations have gone, this reservation has been regarded as giving the purpose of the taking a public character; and where there has been no such reservation the language of the courts has usually implied that its absence was the only thing lacking in the act essential to its validity. This point is of great practical importance. To the lobbyist it offers a handy avenue of escape from the embarrassment of having his proposed law declared unconstitutional. For it is one thing to reserve in words a power of control over a proposed undertaking, but it is quite another thing to make that control effectual in practice. Moreover, there is a danger that while endeavoring to get rid of the evils at which government regulation aims, the public may lose sight of the evils which government regulation fosters. That the right to take private property under a delegated power of eminent domain may be safely extended, if accompanied by a corresponding extension of government regulation is a doctrine, which although not expressly declared by the courts, seems to be more or less clearly implied by their decisions in many cases.[19]

Modification of this Implied Doctrine—Inherent Nature of Business—Electrical and Water Power.—Some of the courts while insisting that in order to justify the taking of private property under the power of eminent domain the business in behalf of which the property is taken must be subject to government control and regulation, suggest that apart from its external regulation, there must be some peculiarity inherent in the business itself, so that it may properly be the subject of a public use. Thus the supreme court of Minnesota drew a distinction between the business of developing and selling water power, and that of developing and selling electricity. Of the latter it said: "The generation of electricity by water power for distribution and sale to the general public on equal terms, subject to government control, is a public enterprise and property so used is devoted to a public use," and holding that a corporation organized for such a purpose might properly be authorized to exercise the power of eminent domain. But of the business of developing and selling water power it said: "Supplying water power from the wheels thereof is an entirely different proposition. Water power is not like electrical power, capable of being subdivided into innumerable units and transmitted long distances. The petition states that the company intends to sell the water power from the wheels, to all who desire to purchase it,

onymous with public benefit. This is true wherever the question has been raised under the modern acts. See Brown v. Gerald (Me.), 61 Atl. 785, 70 L. R. A. 472; Rockingham County L. & P. Co. v. Hobbs, 72 N. H. 531, 66 L. R. A. 581, 58 Atl. 46; In re Rhode Island Suburban R. Co., 22 R. I. 457, 52 L. R. A. 879, 48 Atl. 591; Gaylord v. Sanitary District of Chicago, 204 Ill. 576, 63 L. R. A. 582; Minnesota Canal & Power Co. v. Koochiching Co., 107 N. W. 405, 5 L. R. A. (N. S.) 638; Minnesota Canal & Power Co. v. Pratt, 101 Minn. 197, 112 N. W. 395, 11 L. R. A. (N. S.), 105; Water Power Co. v. Circuit Judge, 133 Mich. 48.

(19) See mill cases already cited and particularly Burlington v. Beasley, 94 U. S. 310, 24 L. ed. 161. Leavenworth v. Miller, 7 Kan. 479; and cases cited in note (18). In some of these cases there are suggestions that the character of the proposed business as a natural monopoly is also to be considered in determining whether eminent domain may rightfully be exercised in its behalf. See Varner v. Martin, 21 W. Va. 548; Fallsburg Power & Mfg. Co. (Va.), 61 L. R. A. 129.

and the appellant admits that it will be subject to government regulation. But words cannot always conceal facts. This statement of the company's purpose cannot control the fact that it is a physical and mechanical impossibility for water power to be sold from the wheels to more than a few persons. A public use does not require that the property be capable of being used by the entire public, or by any particular portion thereof; but a use which by physical conditions, is restricted to a very few persons, who must use it within a very restricted area, is not a public use. Water power from the wheels must be used at the wheels, and the actual result necessarily is, that a very few individuals will use the power for manufacturing purposes, to the exclusion of all others."[20]

Generation and Sale of Electricity as Public Purpose, Irrespective of Regulation.—As already stated, the tendency of the courts has been to restrict the doctrine that public purpose in the law of eminent domain, is equivalent to public benefit, to the Mill acts. A few cases have, however, extended this doctrine to electrical and water power acts. Such was the ruling of the Montana court in a case decided in February, 1907.[21] The company was engaged in developing water power, by damming the Missouri river. It proposed to develop 25,000 horsepower of electrical power, of which it had contracted to transmit 7,000, to the mines of Butte and the Smelters of Anaconda. Of the balance it proposed to use 6,000, in pumping water with which to irrigate some 20,000 acres of land, and the remainder for lighting and power generally, as the exigencies of demand might determine. For these purposes the court held that the company had the right to take respondent's land as for a public use, declaring that in so holding it was following the broad and "statesman-like" view of the question as to what constitutes a public purpose, which the New England courts had adopted with reference to the Mill Acts, which had contributed so much to the advancement of these states in the manufacturing line. The court also declared that this view had been adopted with reference to electric power plants by the courts of Idaho and Utah, citing Salt Lake City v. Salt Lake City Electrical Power Co., 25 Utah, 456, 71 Pac. 1071; Holister v. State, 9 Idaho, 651, 71 Pac. 339.[22]

Use to be Made of Electrical Power as Determining Whether a Public Purpose—Lighting—Manufacturing.—Some of the courts have held that the generation of electricity to be used in lighting a city is a public purpose authorizing a grant of the power of eminent domain to a corporation even although its charter does not provide for its regulation, while at the same time declaring that if used as power only its generation could not be regarded as a public purpose.[23] Thus the Supreme Courts of Maine said: "We repeat, that we think that no one would now deny that electric lighting for the public is a public use, and that a corporation engaged in that business may properly be granted the right of eminent domain. And we have no occasion at this time to deny that the right of eminent domain might properly be granted to a corporation to enable it to generate, sell and distribute electricity for public lighting, although not a lighting company itself. The question now is was this defendant a quasi public corporation as respects creating, selling and distributing electrical power for manufacturing and mechanical purposes. We think that the ultimate use of the power is an important consideration. If that use would be essentially a private use in a private business, will it become a public use by merely multiplying the number of persons who may have occasion to use the power? . . . In other

(20) Minnesota Canal & P. Co. v. Koochiching Co., 107 N. W. 405, 5 L. R. A. (N. S.), 638; Minnesota Canal & P. Co. v. Pratt, 101 Minn. 197, 112 N. W. 395, 11 L. R. A. (N. S.) 105.

(21) Spratt v. Helena Power Transmission Co., 8 L. R. A. (N. S.), 568.

(22) See also Denver Power & Irrigation Company v. Colorado & S. R. Co., 30 Col. 204, 60 L. R. A. 383.

(23) Brown v. Gerald, 70 L. R. A. (Me.), 472; Compare, Jones v. N. Ga. Elect. Co., 6 L. R. A. (N. S.), 122.

public uses, the supplying them to some does not disenable the company to supply to others. The use is not exhausted by using. If the railroad carries one it is not thereby made less able to carry others. It is simply a matter of more train. . . But a power service is entirely different. By every unit used the capacity to serve others is so much exhausted. . . Suppose as in this case the first customer agrees to take it all; what is the next customer to do? But has not the company the right to sell it all? And if it be a quasi public corporation for the production of power, when it has fully used the powers given to it, it can be under no further public duty." On the other hand, Justice Chase of the New Hampshire court took the view that the generation and distribution of electricity, is as much a public purpose as the distribution of water to a city. Speaking for the court in the case of Rockingham County Light & P. Co. v. Hobbes,[24] he used the following language:

"The demand for power is of a public character. Like water, electricity exists in nature in some form or state, and becomes useful as an agency of man's industry only when collected and controlled. It requires a large capital to collect, store and distribute it for general use. . . It may happen that the business cannot be inaugurated without the aid of the power of eminent domain for the acquisition of the necessary land or rights in land. All these considerations tend to show that the use of land for collecting, storing and distributing electricity for the purpose of supplying power and heat to all who may desire it, is a public use, similar in character to the use of land for collecting, storing and distributing water for public needs, a use so manifestly public that it has seldom been questioned and never denied."

Power for Railroads and Street Railroads.—On principle it would seem that where the cars of a railroad or street railroad are propelled by electricity the generation of the electricity is as clearly a part of the business, as is the generation of steam when steam is used as the motive power; and that the taking of land when reasonably necessary to procure the power would be as much a taking for a public purpose as a taking for the construction of the road bed.[25] There is, however, sometimes a difficulty in determining whether a necessity exists for taking a particular piece of land. Thus, where a street railroad company sought to condemn land five miles from any of its track lines, although near the center of its system, and the most convenient location for a power house, the Supreme Court of Rhode Island took the view that the convenience of location was merely a matter of private benefit, and therefore the land could not be taken as for a public purpose.[26] But where the company proposing to take the land does not itself own or operate the railroad, but is merely an electrical company, it is held by the Vermont court that in the absence of a reserved power of regulation the company can not be legally authorized to exercise the power of eminent domain.[27]

Where Company Incorporated for Private as Well as Public Purposes.—A delegation of the power of eminent domain to a corporation incorporated for purposes that are both public and private will not be sustained when it is optional with the company to devote the land sought to be condemned, to either the public or the private purpose. As was said by the Wisconsin court: "It seems too plain for discussion that if the legislature grant an equivocal power, subject to the election of the grantee, for either one or other of two purposes, the one lawful and the other unlawful, *the*

(24) 72 N. H. 535, 66 L. R. A. 584, 58 Atl. 46.

(25) Re Niagara L. & O. P. Co., 111 App. Div. 686, 97 N. Y. Supp. 853; Re East, Canaca Creek Electric Light & P. Co., 49 Misc. 565, 99 N. Y. Supp. 109; State ex rel Harland v. C. C. E. R. & P. Co., 7 L. R. A. (N. S.), 198, 42 Wash. 632.

(26) Re Rhode Island Suburban R. Co., 22 R. I. 457, 52 L. R. A. 879, 48 Atl. 591. See also Rockingham County L. & P. Co. v. Hobbs, 66 L. R. A. 585, where the Rhode Island case is criticised.

(27) Avery v. Vermont Electrical Company, 59 L. R. A. 817.

power cannot be upheld upon the chance of its being lawfully applied."[28]

If Private Purpose a Mere Incident to the Public Purpose.—It is, however, well settled that the right of eminent domain may be lawfully granted to aid a public purpose, although incidentally a private purpose will be subserved. Thus in Maine a lighting company might lease its surplus power for manufacturing so long as lighting was its principal business and still have authority to take land for its plant and wires.[29] And so a company operating a public canal might use its surplus water in generating electricity, for sale, in jurisdictions where the latter is not deemed a public purpose.[30]

Measure of Damages in Condemning Water Power—Interest of Public—Of Riparian Owner.—What interest in the water passing over a natural water fall has the owner of the adjacent and subjacent land? Does he own the falling and the running water so that when taken to be applied to the development of electricity he is entitled to receive whatever value it has for that purpose? Or does the title to the water vest in the public for all public purposes? When the owner of the land himself uses the natural head produced by the fall is he appropriating public property? Does the use of water for the development of electricity stand on a legal basis similar to that of its use for navigation purposes? If so, then the taking of water power is a taking of public property; and there are decisions that would support this view.[31] But assuming that the owner of the land is also the owner of the water as it passes from the higher to the lower level, how shall his compensation be computed, when the land and water are taken under the power of eminent domain? It is easy to say that he is entitled to the value of the land considered with reference to its water privilege. But how determine the value of the water? It is easy to say that its value in its natural state is the difference between its value when developed into electrical power and the cost of developing it. An examination of the factors that enter into its value as electrical power will serve to show how essential it is that water power be treated as public rather than private property, and that is our purpose as much as a statement of the law with reference to the measure of damages in proceedings for condemning the land and water for an electrical power plant.[32] In the first place, without the

(28) Attorney General v. City of Eau Claire, 37 Wis. 437; Water Power Co. v. Circuit Judge, 133 Mich. 48; Brown v. Gerald, 100 Me. 351, 70 L. R. A. 464.

(29) Brown v. Gerald, 70 L. R. A. 472.

(30) Green Bay & M. Canal Company v. Patten, 172 U. S. 58, 43 L. ed. 364; Kaukauna Water Power Co. v. Green Bay & M. Canal Co., 142 U. S. 254, 35 L. ed. 1004; Ross v. Roanoke Navigation & Water Power Co., 19 L. R. A. 247, 111 N. C. 437; Rundle v. Delaware & R. Canal Co., 14 How. 80, 14 L. ed. 335; Armstrong v. Pa. R. Co., 38 N. J. L. 1; Hoppock v. U. N. J. R. & Canal Co., 27 N. J. Eq. 286; McCombs v. Stewart, 40 Ohio St. 647; Hankins v. Lawrence, 8 Blackf. 266.

(31) This in fact seems to be the view supported by the weight of authority and reason. That by a grant of the land the riparian owner should be given such title in the falling and running water as would make him the sole beneficiary of its use, and entitled to compensation when appropriated for public purposes, is a doctrine which at this day, when the value of the water power is so relatively great and the value of the adjacent land is so relatively insignificant—must strike the unbiased mind as unreasonable. In St. Anthony Falls Water Power Co. v. Board of Water Commissioners, 168 U. S. 349, 42 L. ed. 497, the Supreme Court of the United States, approved of the decision of the Minnesota court, holding that the waters of a lake, might be appropriated by the city of St. Paul, without any compensation to the riparian owner (the plaintiff) for the diversion of the water, which would otherwise have passed over the water power wheels belonging to the plaintiff. See also People, ex rel Loomis v. Canal Appraisers, 33 N. Y. 467; People v. Tibbets, 19 N. Y. 523; Homochitto River Commrs. v. Withers, 29 Miss. 21, 64 Am. Dec. 126; Cameron Furnace Company v. Pa. Canal Co., 2 Pearson (Pa.), 208; Shrunk v. Schuylkill Nav. Co., 14 Serg. & R. 71; Rundel v. Delaware & R. Canal Co., 14 How. 80, 14 L. ed. 335; Green Bay & M. Land Co. v. Kaukauna Water Power Co., 70 Wis. 635, 36 N. W. 828, 142 U. S. 254, 35 L. ed. 1004, and see United States v. Chandler Dunbar Company, the decision in which was handed down by the Supreme Court, April 20, 1908.

(32) In fact, the only cases we have been able to find in which the property value of a natural water power has been considered in condemnation proceedings are: Mary Brown v. W. T. Weaver Power Company, (N. C.), 52 S. E. 954, 3 L. R. A. (N. S.), 912, and Rankin v. Harrisonburg, (Va.), 52 S. E. 555, 3 L. R. A. (N. S.), 919. In a note to the former of these cases the L. R. A. annotator cites as bearing on the question, Farnham Waters, 1776, 1876; Ellington v. Bennett, 59 Ga. 286; Marsh v. Trullinger, 6 Ore.

right and power to transmit the electricity, many water powers of great head and volume, because of the rocky and mountainous character of the region where they are located would be wholly worthless. Hence the right of transmiting and of constructing the necessary appliances therefor may be a factor of the first importance in determining the value of a water power, and government action, that is the power of eminent domain may be necessary to the transmission of the electricity. Again the flow of the water must be constant and there must be no great variation in its volume, if it is to be a reliable producer of electrical power, and the value of the power will always depend more or less upon its constancy. Here again governmental power and governmental action on a large scale may be necessary to regulate the flow and volume of water powers valueless without such regulation but of untold value when regulated, through a proper system of reservoirs, and a proper supervision and preservation of forests. Then again vast water powers have already been created as an incident to irrigating schemes, and the construction of canals by the federal and by state governments and the control of these water powers must necessarily be with the government that controls the public work to which they are subordinate.[33] In fact water powers are so related to river navigation, irrigation and forestry, and these to each other, and the whole to the material well-being of the country, that if government supervision and control is necessary for one, it is for all. But again, the value of water power depends also upon the price for which electrical power can be sold. At present no doubt there is a market value for electricity, dependent upon the demand and supply, and affected more or less by competition. But suppose the riparian owners of water powers should combine or should organize as a single huge corporation, they could undoubtedly control the price of electricity as effectually as the Standard Oil Company has ever been able to control the price of oil. If the intrinsic nature of any business adapts it to the ends of monopoly, that business is the electrical and water power business.

But this discussion would lead far beyond the limits of this paper, and may suffice as the subject of another article.

W. A. COUTTS.

Sault Ste. Marie, Mich.

356. He says: "If the property is a part of a natural water power, that fact in most instances would give it its chief value, and therefore its value in the market would be largely determined thereby. * * * And the adaptability of the property for reservoir purposes cannot be made the sole basis of recovery to the exclusion of all other elements of value. Alloway v. Nashville, 88 Tenn. 510, 8 L. R. A. 123, 13 S. W. 123. So, Moulton v. Newbury Port Water Co., 137 Mass. 163, held that the true measure of damages was the fair market value of the land, and not its value as a storage basin. * * * The only case which seems to be out of line is Gibson v. Norwalk, 13 Ohio C. C. 428, which held that, the fact that land sought to be appropriated for a reservoir, is especially adapted to that purpose, cannot be considered in determining the market value of the property, there being no general demand in the market for it for such purpose. That case, however, seems to unduly restrict the right of the property owner, and deprive him of a portion of the value of his land, since he may have intended to devote it to the reservoir purposes himself, or may have purchased it with a view to its adaptability to that purpose."

(33) Kaukauna Water Power Co. v. Green Bay & M. Land Co., 142 U. S. 254. See also cases cited in 61 L. R. A. p. 853, 854.

INNKEEPERS—MEASURE OF RESPONSIBILITY TO GUEST.

LYTTLE v. DENNY.

Supreme Court of Pennsylvania, Jan. 4, 1909.

Where the top of a folding bed in a hotel falls down upon a guest lying upon the bed, the burden of proof is on the innkeeper to show that the accident happened from no want of care on his part.

POTTER, J.: From the history of this case it appears that in May, 1903, the plaintiff was a guest at the hotel of the defendant in Johnstown, Pa. In the room which was assigned to him there was an old-style folding bed, with a wardrobe in the back, and so arranged that the bed portion would fold up so as to leave the bed in an upright position when not in use. The top of the bed was heavy, weighing about 300 pounds. The plaintiff occupied the bed during the night, and early the next morning, as he was about to rise, the top or upright portion of the bed fell forward upon

him, crushing his head down upon his breast and inflicting severe injury. To recover damages for the injury thus caused the plaintiff brought this suit against the proprietor of the hotel. Upon the trial at the conclusion of plaintiff's testimony, the court entered judgment of compulsory nonsuit, and from the refusal to strike it off the plaintiff has appealed.

The main question raised is as to the liability of an innkeeper to his guests. We find the general rule of law in this respect is thus stated in Beale on Innkeepers and Hotels, Sections 162, 163: "The innkeeper is bound to provide reasonably safe premises. * * * Both in original safety of construction and in maintenance the premises must be such as reasonably to secure the safety of the guest. So the innkeeper has been held liable for injury to the guest by the ceiling falling upon him, owing to its defective condition; by the elevator falling with him, after having been negligently inspected, although the innkeeper himself had employed a proper inspector, and was not personally negligent; by the breaking of a defective railing, by reason of which the guest fell into an area; and by the guest falling off an unguarded stairway." The authorities are in substantial agreement that while the duty of an innkeeper requires him to take reasonable care of the persons of his guests, he is not to be regarded as an insurer of their safety. His ability has sometimes been declared to be similar to that of a common carrier, but the better opinion seems to be that the degree of care required of an innkeeper is not so great as that which is imposed upon those who carry passengers for hire. In discussing this question in Clancy v. Barker, 131 Fed. 161, 66 C. C. A. 469, 69 L. R. A. 653, Judge Sanborn says: "While there are many loose statements in the books to the effect that the liability of common carriers to their passengers and the liability of innkeepers to their guests are similar, and while that proposition may be conceded, it is certain that the limits of these liabilities are by no means the same. A railroad company is liable to its passengers for a failure to exercise the utmost care in the preparation of its road and the operation of its engines and trains upon it, because the swift movement of its passenger trains is always fraught with extraordinary danger, which it requires extraordinary care to avert. But an innkeeper's liability for the condition and operation of his hotel is limited to the failure to exercise ordinary care, because his is an ordinary occupation, fraught with no extraordinary danger." It may be assumed, then, that the duty imposed by law upon an innkeeper requires him to furnish safe premises to his guests, and to provide necessary articles of furniture, which may be used by them in the ordinary and reasonable way without danger. Did the defendant, then, in this case, use such reasonable care in the discharge of this duty to the plaintiff who was his guest? The testimony introduced showed the fact and manner of the accident, but stopped short of pointing out the exact defect in the bed which caused it to fall down upon and entrap the plaintiff. The trial judge thought it was incumbent upon the plaintiff to show in detail just what was wrong with the bed, and the reason for its falling; and, because this did not appear from the testimony offered by the plaintiff, judgment of nonsuit was entered. We do not agree with his view in this respect. Bearing in mind the duty of the innkeeper to guard with reasonable care the safety of his guests, proof of the happening of such an extraordinary accident casts the burden of explanation at once upon the defendant. The accident was so far out of the usual course that no fair inference can arise that it could have resulted from anything less than negligence upon the part of the management of the hotel. Beds do not usually operate as spring traps to close upon and catch the confiding guest. Yet the bed furnished by the defendant to the plaintiff in this case proved to be just such a dangerous trap. Without any apparent cause the heavy head fell forward and down over the plaintiff while he was quietly lying upon the bed, and injured him severely. This could not have occurred had the bed been in proper condition for use. We think the facts bring the case within the rule laid down in Scott v. London, etc., Docks Co., 3 Hurlst. & C. 596, and often applied by this court, as in Delahunt v. United Tel., etc., Co., 215 Pa. 241, 64 Atl. 515, 114 Am. St. Rep. 958, where the principle is stated as follows (page 248 of 215 Pa., page 517 of 64 Atl. [114 Am. St. Rep. 958]): "Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of examination by the defendants, that the accident arose from want of care." The circumstances under which this accident occurred were certainly such as to call for full explanation by the defendant. The facts indicate a lack of reasonable care upon his part, and it is for him to show why he should be relieved from liability.

Counsel for appellant also complain of the exclusion of certain depositions which were offered in evidence. But it appears that no

rule of the lower court authorized the taking of the depositions of the witnesses in question, and they were therefore properly excluded. The rules of the Cambria county court provide for taking the depositions of ancient, infirm, and going witnesses, but it was not shown that these witnesses were within this classification, or that their presence in court might not be obtained.

The first, second, and third assignments are overruled, but as we deem the facts shown sufficient to take the case to the jury upon the question of the defendant's negligence, the fourth assignment of error is sustained, and the judgment is reversed with a procedendo.

NOTE.—*The Responsibility of an Innkeeper for the Acts of Servants to Guests.*—We think it can scarcely be doubted that the principal case is in line with the great weight of authority as to an innkeeper being only bound to ordinary care as to safety of place and appliances. This responsibility may be as strict as that of master to servant, but we do not think it may be fairly contended that it is any stricter, and not as strict as that respecting goods of a guest under the common law rule. This latter rule made the innkeeper an insurer. Crapo v. Rockwell, 94 N. Y. S. 1122; Clark v. Ball (Colo.), 83 Pac. 529; Shaw v. Berry, 31 Me. 478, 52 Am. Dec. 628; Willard v. Reinhart, 2 E. D. Smith 148; Cunningham v. Bucky, 42 W. Va. 671, 26 S. E. 442, 57 Am. St. Rep. 878, 35 L. R. A. 850. It has been thought that this rule of insurer proceeded on the theory of preventing collusion between the innkeeper and thieves under his roof. Though the rules may have found some mitigation in modern days, it survives everywhere sufficiently for a guest to make a *prima facie* case against an innkeeper by showing loss or injury and then he must show exoneration. Hubbart v. Hartman, 79 Ill. App. 289; Bowell v. DeWald, 2 Ind. App. 303, 28 N. E. 430, 50 Am. St. Rep. 240; Baehr v. Downey, 133 Mich. 163, 94 N. W. 750, 103 Am. St. Rep. 444.

The question, however, suggested by the heading of this note may be more readily supposed to arise out of later conditions, than those older ones that caused rules then applicable to breed a sort of confusion in modern jurisprudence. These times are considered to be more observant of law and order than the older times and the very principle which made an innkeeper an insurer of a guest's effects at common law was a rule that recognized the prevalency of disorder. In olden times a guest was supposed to look after himself more than now and an innkeeper's servant's duties were far more limited in their scope. Nowadays attention by servants and the looking after the care and comfort of guests are more largely incident to the mere necessities an innkeeper supplies to his patrons. It is the accessories that greatly distinguish first-class establishments from others. In the days of King Harry, the first man to reach the trencher board was the best served and he had to get there himself. We think the principal case just a little inapt in its citation of the Clancy case, as a distinct idea, not pertinent to the question before the court, is involved, the question in the principal case being that of safety of place or appliances, whereas this particular question in the Clancy case was that of responsibility for the acts of servants. It is to this question our annotation is intended to apply.

Judge Sanborn, writing the majority opinion in the case referred to, appears all through it to have been under an influence more of a dogmatic than a judicial nature. He seemed to have been sort of "warm" at the Supreme Court of Nebraska, because it disagreed with him and notwithstanding Judge Thayer was dissenting from him and agreeing with the Nebraska court, he appears to talk about the Nebraska opinion as being "a retroactive decision, which makes and applies a new rule of law" to the implied contract of the innkeeper. One would suspect that the occasion of disagreement with a state court in applying a state's law was not unwelcome to a judge who, by accident, is called in to say what the state's law is.

The Clancy case cites a number of cases where railroads were held liable for servants injuring, and insulting passengers, and remarks upon them: "When all these authorities and others cited by counsel for plaintiff, are carefully considered, it clearly appears that the controlling reasons why common carriers have been held liable for the willful or negligent acts of their servants in these cases are: (1), that they owe to their passengers the highest degree of care, and (2), that during the transportation they intrust the entire care, custody and control of their trains, steamboats and passengers to these servants, and the passengers yield obedience and control of their movements to these servants, under conditions of peril and subordination in which the passengers are confined and helpless."

This does not seem very clear. A common carrier is bound to a high degree of care as to the safety of a passenger, but to say this insures also courtesy, consideration, freedom from insult is building a basis for a rule that lies in refinement. A carrier agrees to transport one safely. A hotel-keeper agrees to care for a guest's comfort, and lack of courtesy seems more directly against comfort than as interfering with safety. No one would stop at a hotel where servants are impolite or insulting. No one would stop to ask whether a brakeman was polite or impolite and a conductor is not a waiter, but merely a ticket collector. In hotel accommodation a guest does distinctly look to relationship with servants; in travel, a passenger considers no such circumstances. Judge Thayer, in his dissent, seemed not impressed by the argument of Judge Sanborn about "swift movement of trains," etc., and he says: "I have been unable to discover any sufficient reason why the innkeeper should not be responsible to his guests for any willful and wrongful acts of his servants, committed within the hotel, to the same extent that the carrier is responsible to his passengers for like wrongful acts of its servants." Indeed, it seems to us that the hotelkeeper does more directly promise this very thing than a carrier does. It rests on implied contract to give entertainment and comfort.

The two cases sounding Clancy v. Barker, one in 69 L. R. A. 642, 98 N. W. 440, and 69 L. R. A. 653, 131 Fed. 161, 66 C. C. A. 469, arose out of the same facts, the case in the state court being by the father of an injured child and that in the federal court by the child, and defendant was

held liable in the former and not in the latter. A servant, then not on duty, shot the child while negligently pointing at him a loaded gun, the child being with his parents, a guest.

The state court cites a number of cases and says: "The foregoing (citation of cases) also shows that the duties of a hotelkeeper to his guests are regarded as similar to the common-law obligation of a carrier to his passengers." It has been perceived that Judges Sanborn and Thayer agree what that is. Chief Justice Shaw, instead of arguing, as the opinion written in the Clancy cases did, that the liability of the hotelkeeper was as strict as that of common carrier, took the converse view, and claimed the common carrier's liability should be likened to that of hotelkeeper. Thus he said: "An owner of a steamboat or railroad, in this respect, is in a condition somewhat similar to that of an innkeeper, whose premises are open to all guests. Yet he is not only empowered, but he is bound, so to regulate his house, as well with regard to the peace and comfort of his guests, who there seek repose, as to the peace and quiet of the vicinity, as to suppress and prohibit all disorderly conduct therein." Substantially this language is found in Dickson v. Waldron, 135 Ind. 507, 34 N. E. 510, 24 L. R. A. 483, 41 Am. St. Rep. 440, that case adding that the guest may particularly demand that they "suffer no wrong from the agents and servants" of the innkeeper.

It has been held that just as a master may show care in selection of servants as a defense, so may a hotelkeeper, where a servant maliciously attacked a guest. Rahmel v. Lehndorff, 142 Cal. 681, 76 Pac. 659, 65 L. R. A. 88, 100 Am. St. Rep. 154. What seems to this annotator more wrong than anything else about this whole course of decision is the holding of common carriers to the same degree of liability as to injury or insult by its servants of a willful character as they are held as to safety in their means of transportation.

N. C. COLLIER.

JETSAM AND FLOTSAM.

CRIMINAL ACTS SET IN MOTION IN ONE STATE AND TAKING EFFECT IN ANOTHER.

Much general interest should attach to the fact that the conviction of Cordelia Botkin of murder in the first degree, and her sentence to imprisonment for life, have been finally affirmed by the Supreme Court of California (December, 1908, 98 Pac. 861). The case has been before the California courts for ten years. The verdict of the jury establishes that in August, 1898, defendant, at the City of San Francisco, prepared and sent through the mail certain poisoned candy to one Mrs. Dunning at Dover, in the State of Delaware, where it was received by the latter and eaten, and from the effects of which she there died. The conviction of the defendant was under a statute of California, which will be hereafter referred to.

At common law the locus of the crime is where an unlawful act takes effect, and not the place where it is set in motion. A celebrated case is State v. Hall, in which it appeared that the defendants, being in North Carolina, fired a shot which caused the death of a person who was across the boundary line in Tennessee. They were tried for murder in North Carolina, but the supreme court of that state held (114 N. C. 909) that the courts of Tennessee alone had jurisdiction, because the prisoners "were deemed by the law to have accompanied the deadly missile sent by them across the boundary and to have been constructively present when the fatal wound was actually inflicted." Subsequently it was attempted to extradite the defendants from North Carolina to Tennessee, but the Supreme Court of North Carolina refused that remedy because the prisoners had not been actually within the state of Tennessee, and therefore were not fugitives from justice within the meaning of sections 5278, 5279 of the Federal Revised Statutes (115 N. C. 811).—New York Law Journal.

NEWS ITEM.

CHICAGO PROPOSES SOME REFORMS IN PROCEDURE.

The lawyers of Chicago are inciting a reform in procedure. The initiative has been taken by judges of the superior court.

A committee composed of Judge Marcus A. Kavanagh, Mr. H. V. Freeman and Mr. Albert C. Barnes, have been appointed to revise the procedure applicable to the courts in Cook county.

The committee, we understand, have united on three proposed reforms, to-wit: 1. That judges be given the right to present oral instructions to juries as in the federal courts. 2. That no case be reversed on appeal for error, either upon the court's judgment upon the issues of law or the issues of fact unless it is clearly evident that appellant was prejudiced thereby in the case of an error of law or that the court was prejudiced in passing judgment upon the facts. 3. That the state's attorney shall have the right to amend indictments for error of form.

HUMOR OF THE LAW.

Some years ago, a man in Nantucket was tried for a petty offense, and sentenced to four months in jail. A few days after the trial, the judge who had imposed sentence, in company with the sheriff, was on his way to the Boston boat, when they passed a man busily engaged in sawing wood.

The man stopped his work, touched his hat politely, and said: "Good morning, your Honor."

The judge, after a careful survey of the man's face, asked: "Isn't that the man I sentenced to jail a few days ago?"

"Yes," replied the sheriff, with some hesitation, "that's the man. The fact is, Judge, we—er—we don't happen to have anybody else in jail just now, so we thought it would be a sort of useless expense to hire someone to keep the jail four months just for this one man. So I gave him the jail key and told him it would be all right if he'd sleep there o' nights."—Harper's Weekly.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort and of all the Federal Courts.

1. **Abatement and Revival**—Abstract Questions.—Where appellant dies after appeals in actions which abated upon his death, the appeals will be dismissed; the records presenting mere abstract questions, the determination of which could be of no practical benefit.—Hannon v. Harper, Cal., 98 Pac. 685.

2. **Accident Insurance**—Cause of Death.—In an action on an insurance policy for death by accidental injury, an instruction, while not affirmatively requiring a finding that insured's death was caused by the accident independent of all other causes, held to do so in effect.—General Accident, Fire & Life Assur. Co. v. Homely, Md., 71 Atl. 524.

3. **Action**—Single Cause of Action.—In actions for services, or for materials furnished, or for goods sold, where the complaint alleges both value and agreed price, such allegation does not state two causes of action, since defendant may have specially agreed to pay the price.—Rubin v. Cohen, 113 N. Y. Supp. 843.

4. **Appeal and Error**—Certificate of Clerk.—A certificate of the clerk to the transcript, which merely states that it contains a correct transcript and a true recital of all the papers in the cause, held fatally defective.—Globe & Rutgers Fire Ins. Co. v. Lewallen, Fla., 47 So. 795.

5.——Cross Examination of Witness.—A witness having subsequently stated that he did not know of plaintiff using an elevator prior to the accident, the disallowance of prior questions as to how many times plaintiff had used the elevator was without prejudice.—Roth v. Buettel Bros. Co., Iowa, 119 N. W. 166.

6.——Matters Not Shown by Record.—Where the record on appeal fails to show that a substitute judge, in making an order of reference, acted at the request of the regular judge, it will be presumed that such request was made.—Alexander v. Wellington, Colo., 98 Pac. 631.

7.——Questions Reviewable.—Where one obtained by a judgment all that he was entitled to, it was immaterial whether his right was referable to the title of a decedent and mesne conveyances, or through descent to the heirs of decedent and such conveyances.—Poluckie v. Wegenke, Wis., 119 N. W. 188.

8.——Undertaking.—An undertaking on appeal from a judgment, and from an order denying a new trial, sufficient to sustain both, will sustain the appeal from the order, after the appeal from the judgment is dismissed because not taken within the required time.—Kaufman v. Cooper, Mont., 98 Pac. 504.

9. **Assignments**—Buyer's Liability to Third Persons.—Where the seller of goods assigned the right to receive payment to another with notice to the buyer, in consideration of advances, the buyer was liable to the assignee for the price.—Schwab v. Oatman, 113 N. Y. Supp. 910.

10. **Assumpsit, Action Of**—Grounds.—Where an express contract not under seal has been fully performed, and nothing remains to be done except to pay therefor, plaintiff need not declare specially on the contract, but may count on the implied assumpsit.—Rubin v. Cohen, 113 N. Y. Supp. 843.

11. **Bankruptcy**—Discharge.—Under Code Civ. Proc. Sec. 1268, the discharge in bankruptcy of a partner against whom no individual judgment in an action against a firm was rendered held not to entitle him to a discharge of the judgment.—In re Gruber, 113 N. Y. Supp. 923.

12.——Preferences.—A transfer of property by a borrower at the time of receiving a loan and for the purpose of making the lender safe is security, and its validity, if not accompanied by positive fraud, is recognized and enforced in bankruptcy.—McDonald v. Clearwater Shortline Ry. Co., U. S. C. C., 164 Fed. 1007.

13. **Banks and Banking**—Claims Against Depositors.—A bank holding the note of a depositor held not required in absence of directions from the depositor, to apply to the note the deposits, if insufficient to discharge the note, but could collect it and recover the reasonable attorney's fees stipulated therein.—Boothe v. Farmers' & Traders' Nat. Bank of La Grande, Ore., 98 Pac. 509.

14. **Benefit Societies**—Right to Sell Business.—The officers of a mutual indemnity insurance company doing business on the installment plan without capital stock could not sell any interest in the company.—Sauerhering v. Rueping, Wis., 119 N. W. 184.

15. **Bills and Notes**—Order to Pay Money.—An order for the payment of money, addressed to no one in particular, but generally to any one for whom the maker might be employed or who owed him money, is too indefinite and uncertain to be binding on any one.—Dugane v. Hvezda Pokroku No. 4, Iowa, 119 N. W. 141.

16. **Boundaries**—Conflicting Elements.—Where monuments capable of determination are given, they will control course and distance; but where no monuments are given, or those given cannot be found, and the beginning point is established, the course and distance must be the guide in determining the boundary.—McNeely v. Laxton, N. C., 63 S. E. 278.

17.——Surveys.—Where the north corner and west corner of a survey are marked, and the northwesterly line between them is fixed, the southwesterly line will be located by the official courses and distances, where there are no monuments on such line to stop it short of such dis-

tances.—Enterprise Transit Co. v. Collins, Pa., 71 Atl. 540.

18. **Brokers**—Employer's Liability to Broker.—Where an owner of land procured a broker to obtain a purchaser, and refused to complete the sale, such owner obligated himself to the broker, and the refusal was a breach of that obligation.—T. C. Henry & Sons & Co. v. Colorado Farm & Live Stock Co., U. S. C. C. of App., Eighth Circuit, 164 Fed. 986.

19. **Carriers**—Free Transportation by Express Companies.—Express companies are prohibited from giving free transportation of personal packages to their officers, employees, members of their families, and officers of other transportation companies in exchange for passage issued by the latter to the officers of the express companies.—American Express Co. v. United States, U. S. S. C., 29 Sup. Ct. 315.

20.——Forwarding Companies.—On the issue as to whether a forwarding company is a mere forwarder and not a common carrier, the fact that the company designates its business as a "forwarder" and "distributor" estops it from claiming that it was a mere forwarder.—Lee v. Fidelity Storage & Transfer Co., Wash., 98 Pac. 658.

21.——Rebates.—Offense of giving rebates in violation of 32 Stat. 847, held complete when the carrier to whom the shipper has paid the full legal rate pays on a claim presented by the carrier the amount of rebate stipulated when the shipment was made.—New York Cent. & H. R. R. Co. v. United States, U. S. S. C., 29 Sup. Ct. 304.

22.——Rebates.—A carrier which gives rebates from a joint rate on file with the Interstate Commerce Commission may, though it did not publish and file the rate be convicted of violating Act Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880).—United States v. New York Cent. & H. R. R. Co., U. S. S. C., 29 Sup. Ct. 313.

23. **Charities**—Acceptance by Donee.—Where a fund was bequeathed to a town "toward the erection of a building for the sick and poor," the action of the voters of the town in declining to accept the legacy held equivalent to a refusal to erect the building as contemplated by the will.—Bowden v. Brown, Mass., 86 N. E. 351.

24. **Chattel Mortgages**—Animals and Increase.—A chattel mortgage is merely a lien in this state, and does not transfer title, and hence the increase of sheep mortgaged belong to the mortgagor, unless the increase was also mortgaged.—Ayre v. Hixson, Ore., 98 Pac. 515.

25.——Attorney's Fees.—The allowance of attorney's fees on sums collected by the trustee in a deed of trust securing notes providing for the payment of attorney's fees held improper.—Turberville v. Simpson, Miss., 47 So. 784.

26.——Foreclosure.—In a suit to foreclose a chattel mortgage on sheep, where defendants claimed as innocent purchasers of a part of the sheep, evidence held to show that a large part of the sheep purchased by them were the increase of sheep mortgaged.—Ayre v. Hixson, Ore., 98 Pac. 515.

27. **Confusion of Goods**—Wrongful Intermixture.—Where goods are commingled by mistake, or accident, or by the consent of the owners, neither owner will lose his property, but they will be treated as tenants in common, in proportion to their interests.—Ayre v. Hixson, Ore., 98 Pac. 515.

28. **Constitutional Law**—Delegation of Legislative Power.—A court is without authority to exercise legislative power neither appropriate nor necessary to its judicial or supervisory powers.—In re County Com'rs of Counties Comprising Seventh Judicial Dist., Okla., 98 Pac. 557.

29.——Due Process.—Due process of law is not denied by Act Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), under which commission by corporate officers of violations of that act against giving rebates is imputed to the corporation.—New York Cent. & H. R. R. Co. v. United States, U. S. S. C., 29 Sup. Ct. 304.

30.——Equal Protection of Law.—Act Sept. 5, 1908 (Acts 1908, p. 1112), providing a revenue for the penitentiary by requiring a license of all persons manufacturing, selling, or distributing any imitation of beer, etc., held not a denial of the equal protection of the laws, in violation of Const. U. S. Amend. 14.—Carroll v. Wright, Ga., 63 S. E. 260.

31.——Police Power.—A legislative determination of what is a proper exercise of police power may be reviewed by the courts, and in determining the validity of an act the court may consider what may be done under the act, as well as what was done in the particular case.—People v. Murphy, 113 N. Y. Supp. 855.

32.——Railroad Tax.—Gen. Laws 1903, p. 375, c. 253, increasing the gross earnings tax railroad companies to 4 per cent, impairs no contractual right of the Chicago Great Western Railway Company.—State v. Chicago Great Western Ry. Co., Minn., 119 N. W. 211.

33. **Contracts**—Action for Breach.—Matter set up by a defendant in an action for breach of contract to furnish tin cans to a cannery during the season held to constitute no defense.—Pacific Sheet Metal Works v. Californian Canneries Co., U. S. C. C. of App., Ninth Circuit, 164 Fed. 980.

34.——Construction.—In an agreement to pay money, the use of the word "give" instead of "pay" held not to show that the agreement was a mere voluntary promise to give property without consideration.—Fearnley v. Fearnley, Colo., 98 Pac. 819.

35.——Legality of Object.—An agreement by officers of a mutual insurance company to enable plaintiff to manipulate and control the company for his own interest held contrary to public policy, and void.—Sauerhering v. Rueping, Wis., 119 N. W. 184.

36.——Potestative Conditions.—A potestative condition in a contract ceases to be such when it is fulfilled.—Anse La Butte (Le Danois) Oil & Mineral Co. v. Babb, La., 47 So. 754.

37.——Specific Performance.—An agreement between the promoters of a corporation and a third person held too indefinite to form the basis of an action by the third person against the promoters or the corporation.—Hampton v. Buchanan, Wash., 98 Pac. 374.

38. **Costs**—Printing.—It is the custom in the supreme court to receive typewritten briefs in original proceedings, and the cost of printing a brief in such a proceeding cannot be taxed.—Cronan v. District Court of First Judicial Dist., Idaho, 98 Pac. 614.

39. **Counties**—Subscriptions in Aid of Railroad.—If under Code, Sec. 1996, county commissioners can subscribe for railroad stock to aid in completing a railroad, the power could not be exercised to fix a debt on one or more townships of the county, though the road ran through

one township only.—Wittkowsky v. Board of Com'rs of Jackson County, N. C., 63 S. E. 275.

40. **Courts**—Dicta.—Where the court expresses views upon questions not necessarily before it, such views will be respected, but cannot arbitrarily control a subsequent case.—State v. Great Northern Ry. Co., Minn., 119 N. W. 202.

41.——Jurisdiction.—The court has jurisdiction to establish and enforce a trust in personal property where the subject-matter of the trust is within the reach of the court or where the trustee is within the jurisdiction of the court.—Gassert v. Strong, Mont., 98 Pac. 497.

42. **Court Commissioner**—Fees.—Fees of a master commissioner are not necessarily to be fixed by the standard of judicial salaries in the state, but in accordance with the character of services, the amount in controversy, and the standing of the commissioner.—Weltner v. Thurmond, Wyo., 98 Pac. 601.

43. **Corporations**—General Manager's Authority to Borrow.—The general manager of a corporation selling lumber at retail has no power, through his employment, to borrow money for his company and to issue its note therefor.—Rinzuto v. R. W. English Lumber Co., Colo., 98 Pac. 728.

44. **Criminal Evidence**—Handwriting.—The fact that accused did not offer himself as a witness, and admit the genuineness of samples of his alleged handwriting sought to be used for comparison, held not to preclude other competent proof of their genuineness.—State v. Fillpot, Wash., 98 Pac. 659.

45. **Criminal Law**—Indictment.—Want of particularity in describing the offense in an indictment held no ground for reversing a conviction where it specifically stated the elements of the offense so as to advise defendant of the crime charged in view of Rev. St. U. S., Sec. 1025 (U. S. Comp. St. 1901, p. 720).—New York Cent. & H. R. R. Co. v. United States, U. S. S. C., 29 Sup. Ct. 304.

46.——Indictment.—The pendency of an indictment or information cannot be set up as a ground for continuance of a trial on another indictment or information for the same offense.—Reed v. Territory, Okla., 98 Pac. 583.

47. **Criminal Trial**—Appeal.—In a prosecution for perjury, an objection that the complaint was made on information and belief cannot be considered on appeal, where the record fails to show that the complaint was not based on personal knowledge.—People v. Coombs, Cal., 98 Pac. 686.

48.——Consolidation of Indictments.—The consolidation of indictments for trial is a matter within the sound discretion of the trial court, which will not be interfered with by an appellate court, unless it has been abused or manifest injustice has been done.—Lemon v. United States, U. S. C. C. of App., Eighth Circuit, 164 Fed. 953.

49.——Harmless Error.—Defendant held not prejudiced because his wife was sworn on the trial and asked whether she was his wife at the time of the assault for which he was being tried, to which she replied that she could not remember.—People v. Johnson, Cal., 98 Pac. 682.

50.——Pleading.—In a prosecution charging accused with bringing sheep into the state which were infected with scab, a plea of guilty admitted the bringing of the sheep into the state, and that they were so infected.—Patrick v. State, Wyo., 98 Pac. 588.

51.——Suspension of Proceedings.—In the absence of a showing that affidavits could not be secured, the court was not bound to suspend criminal proceedings until members of a board of supervisors could be brought in for examination to prove facts on which an objection to the indictment was based.—State v. Pell, Iowa, 119 N. W. 154.

52. **Death**—Proximate Cause.—Where death results from a disease caused directly by an accident, the accident is the proximate cause of the death which is regarded as having resulted from the accident, independently of all other causes.—General Accident, Fire & Life Assur. Co. v. Homely, Md., 71 Atl. 524.

53. **Dower**—Election.—Where payments provided for in a separation contract were in lieu of dower, the widow, after the husband's death, would be required to elect whether she would claim dower or the contract provision.—Barnes v. Klug, 113 N. Y. Supp. 325.

54. **Eminent Domain**—Compensation.—A railroad held not entitled to compensation for property taken, pursuant to a railroad commission's reasonable order, for the construction of a connection with another railroad for an interchange of traffic.—Pittsburgh, C., C. & St. L. Ry. Co. v. Hunt, Ind., 86 N. E. 328

55. **Equity**—Laches.—Mere increase in the value of property involved is not such an extraordinary circumstance as will authorize equity to depart from the analogous statute of limitations.—Indiana & Arkansas Lumber & Mfg. Co. v. Brinkley, U. S. C. C. of App., Eighth Circuit, 164 Fed. 963.

56. **Evidence**—Opinion Evidence.—Where a witness stated that he had not known plaintiff intimately for the past six years, but had seen her frequently during that time, he was competent to state the condition of her health.—Fearon v. Mullins, Mont., 98 Pac. 650.

57.——Opinion Evidence.—It being in issue whether another was intestate's agent in selling fruit trees, one working around his nursery held competent to testify for whom the alleged agent was working when the sale was made.—Moyers v. Fogarty, Iowa, 119 N. W. 159.

58.——Sales.—Certain recitals in an act of sale of mules held not conclusive in the face of a charge of fraud and averment of error, but subject to be contradicted by parol.—Donoven & Daley v. Travers & Hermann, La., 47 So. 769.

59.——Testimony Given at Former Trial.—Witness' evidence at former trial held properly admitted where the sheriff's return showed that, after a diligent search, he could not be found in the county.—Pike v. Hauptman, Neb., 119 N. W. 231.

60. **Execution**—Motion to Quash.—A motion by a judgment debtor to quash the levy under an execution and to prevent the sale of the property levied on as personal property held not to lie; the remedy being by action.—Cable v. Magpie Gold Min. Co., S. D., 119 N. W. 174.

61.——Sale of Real Estate.—Where a judgment creditor of an heir was not notified of an administrator's application to sell real estate, his lien was not affected by a sale.—Yoder v. Kalona Sav. Bank, Iowa, 119 N. W. 147.

62.——Unrecorded Deeds.—Where a judgment creditor had no notice of an unrecorded deed, it is immaterial whether a purchaser at a sale under the judgment had notice of such recorded deed or not.—Feinberg v. Stearns, Fla., 47 So. 797.

63. **Executors and Administrators**—Allowance to Widow.—The maintenance of the widow and minor children of a testator pending the settlement of his estate may be charged upon the real estate itself, if the income therefrom and the personal property be insufficient.—In re Fletcher's Estate, Neb., 119 N. W. 232.

64.——Claims Against Estate.—Under Mills' Ann. St. Sec. 4780, the statutory demands of the fourth class held limited to debts contracted by a decedent or resulting from obligations incurred by him.—United States Fidelity & Guaranty Co. v. People, Colo., 98 Pac. 828.

65.——Persons Entitled to Sue.—The second cousins of a decedent are entitled to administration of his estate, if there is no legal objection to them, in preference to the public administrator, though not entitled to share in his estate.—In re Blake's Estate, 113 N. Y. Supp. 944.

66.——Review on Final Report.—Where a partial transcript on appeal from the county court was filed in the district court, held not error to allow a portion of a transcript in the same case which had formerly been filed in the district court to be attached thereto.—In re Etmund's Estate, Neb., 119 N. W. 239.

67.——Sale by Executor.—Persons interested in the estate held entitled to elect to have a sale made by executors to a co-executor confirmed or rejected.—In re Richards' Estate, Cal., 98 Pac. 528.

68.——Sale of Real Estate.—Executors empowered to sell real estate, who sold real property to a co-executor, held entitled to rescind the sale for the fraud of the co-executor.—In re Richards' Estate, Cal., 98 Pac. 528.

69. **Explosives**—Use Intended.—That the manufacturer and seller of a preparation, the ignition of which, while being used on a stove, caused death, did not intend that it should be so used, held not to affect his liability for the death.—Wolcho v. Arthur J. Rosenbluth & Co., Conn., 71 Atl. 566.

70. **Federal Courts**—Corporate Defendants.—A corporation created by act of Congress which designated Dallas, Tex., as its general office, and which maintains an office in Dallas county and has the acts of its directors in New York affirmed by the board at Dallas, is suable in the Northern District of Texas under Act March 11, 1902, c. 183, 32 Stat. 68 (U. S. Comp. St. Supp. 1907, p. 163), and Tex. Sayles' Ann. Civ. St. 1897, arts. 1222, 1223, as a resident in that district.—In re Dunn, U. S. S. C., 29 Sup. Ct. 299.

71.——Opinions of Lower Court.—Under the federal practice the opinion of a trial court cannot be referred to by an appellate court for the purpose of ascertaining the facts upon which the judgment was based, nor to control the formal findings made, although a reference thereto is incorporated in the bill of exceptions.—Pacific Sheet Metal Works v. Californian Canneries Co., U. S. C. C. of App., Ninth Circuit, 164 Fed. 980.

72. **Fire Insurance**—Fraud.—Where an insurance policy is by its terms void for fraud, held, the premium is not recoverable by insured, so that the defense need not allege its return.—National Mut. Fire Ins. Co. v. Duncan, Colo., 98 Pac. 634.

73.——Insurable Interest.—An insurer which with full knowledge that insured had not the legal title, issued a policy, cannot insist upon a clause therein requiring insured to be such an owner.—Arkansas Ins. Co. v. Cox, Okla., 98 Pac. 552.

74. **Forcible Entry and Detainer**—Legal Title.—A person other than the owner entering on land may be ousted in unlawful detainer, though the legal title is the only question involved.—Feder v. Hager, W. Va., 63 S. E. 285.

75. **Fraud**—Policy of Law.—The law will not save persons from the consequences of their own improvidence and negligence, but it looks with even less favor upon misrepresentation and fraud.—Rollins v. Quimby, Mass., 86 N. E. 350.

76. **Game**—Possession During Closed Season.—B. & C. Comp. Sec. 2010, as amended by Laws 1907, p. 342, held not to prohibit the keeping, during the closed season, for food, the flesh of deer lawfully killed during the open season.—State v. Fisher, Ore., 98 Pac. 713.

77. **Gifts**—Inter Vivos.—A gift may be perfected when the donor places in the hands of the donee the means of obtaining possession of the contemplated gift, accompanied with declarations showing an intention to give.—Candee v. Connecticut Sav. Bank, Conn., 71 Atl. 551.

78. **Grand Jury**—Selection.—Accused has no right to any particular grand jury list and cannot complain of an indictment found by grand jurors, the members of which are chosen from a list prepared as provided by law.—State v. Pell, Iowa, 119 N. W. 154.

79. **Highways**—Establishment.—A material variance between the description of a highway in the petition and the road as viewed, located, and established held unavailable in a suit to enjoin construction, unless pleaded.—Boire v. Yamhill County, Ore., 98 Pac. 520.

80. **Homestead**—Rights of Surviving Wife.—A widow need not account to the estate of her deceased husband for the use of the homestead, or the rents accruing subsequent to his death.—In re Fletcher's Estate, Neb., 119 N. W. 232.

81.——Widow's Election.—A widow by neglecting to seek administration on her husband's estate cannot extend the time to elect between homestead and distributive share in homestead property.—Stoddard v. Kendall, Iowa, 119 N. W. 138.

82. **Homicide**—Intoxication as a Defense.—Intoxication is not a defense to homicide, and can be considered only on the question of intent or ability to commit the crime.—State v. Pell, Iowa, 119 N. W. 154.

83. **Husband and Wife**—Agency of Husband for Wife.—Where plaintiff did work and furnished materials on the order of defendant's husband, that defendant was present when her husband gave the order, and that he consulted with her in reference to it, held not sufficient to charge her with liability for payment therefor.—Kissinger v. Jacobs, 113 N. Y. Supp. 819.

84.——Coercion of Wife.——The doctrine of presumed coercion in relation to a wrongful act by the wife in the presence of the husband relates to a mere rebuttable presumption, not disability.—Jones v. Monson, Wis., 119 N. W. 179.

85. **Infants**—Contracts.—A contract binding an infant to render services as an actress for designated seasons held not of a beneficial character, and the court will not prevent the infant from avoiding it during infancy.—Aborn v. Janis, 113 N. Y. Supp. 309.

86. **Injunction**—Enjoining Lawful Business.—Where it is sought to enjoin a lawful business, the court should give due consideration to the comparative injury which will result from the granting or refusal of the injunction sought.—McCarthy v. Bunker Hill & Sullivan Mining & Concentrating Co., U. S. C. C. of App., Ninth Circuit, 165 Fed. 927.

87.——Liability on Bond.—Plaintiff, not having owned a restaurant while its operation was enjoined, cannot recover the profits for that period in an action on the injunction bond.—Lewis v. Collier, Ala., 47 So. 790.

88. **Intoxicating Liquors**—Criminal Prosecutions.—In a prosecution for allowing females to remain in a saloon for the purpose of being supplied with liquor, evidence considered, and held sufficient to show that defendant was "for the time being" in actual charge and control of the saloon.—State v. Conway, Mont., 98 Pac. 654.

89. **Landlord and Tenant**—Failure of Landlord to Repair.—Failure of landlord to repair according to contract renders him liable for the

expense of doing the work, but not for personal injury sustained by the defective conditions of the premises.—Nagle v. Davies, 113 N. Y. Supp. 834.

90.——Option to Purchase.—A lease with option to purchase mining property construed in connection with instructions to a bank with which a deed and lease were deposited in escrow held to give plaintiff an option to purchase during the third year of the contract for $17,500.—Pollard v. Sayre, Colo., 98 Pac. 816.

91. **Limitation of Actions**—Discovery of Fraud.—The nature of the allegations necessary to take an action, based on fraud, out of the statute of limitations because of nondiscovery of the fraud, stated.—Denike v. Santa Clara Valley Agr. Society, Cal., 98 Pac. 687.

92. **Master and Servant**—Care Required in Selecting Employee.—A personal examination of one about to be employed as a conductor of a train held not always essential to the exercise of reasonable care on the part of the railway company.—Still v. San Francisco & N. W. Ry. Co., Cal., 98 Pac. 672.

93.——Defective Appliances.—Use of an elevator by a servant, in order to charge him with notice of defects in the appliances, must have been since the existence of the alleged defects.—Roth v. Buettel Bros. Co., Iowa, 119 N. W. 166.

94.——Incompetency of Fellow Servant.—The incompetency of an employee at the time of his employment may be such that the evidence showing it rebuts the presumption that the employer used the requisite care in his selection.—Still v. San Francisco & N. W. Ry. Co., Cal., 98 Pac. 672.

95.——Injury to Servant.—A master who makes the work more hazardous without notice to the servant is guilty of negligence.—Ferringer v. Crowley Oil & Mineral Co., La., 47 So. 763.

96.——Injury to Servant.——Whether the negligence of a mining company's superintendent in charge of its mine was the proximate cause of injuries to a workman furnished by another company held under the evidence to be a question for the jury.—Hagerty v. Montana Ore Purchasing Co., Mont., 98 Pac. 643.

97.——Liability of Superintendent.—A mining company's superintendent in charge of its mine is not liable for injuries to a workman furnished by another company if the negligence or incompetency of a servant of the mining company was the sole cause of the injury.—Hagerty v. Montana Ore Purchasing Co., Mont., 98 Pac. 643.

98. **Militia**—Actions Against Officers.—Acts 1904, p. 408, No. 181, Sec. 101, does not authorize the suppression of a lawful business carried on by a citizen outside militia encampment when the same business is permitted within the camp grounds.—O'Shee v. Stafford, La., 47 So. 764.

99. **Mines and Minerals**—Development Work.—Work may be done outside the limits of claims and be credited, if beneficial thereto, even if there are several for which the credit is asked, provided the claims are held in common.—Hawgood v. Emery, S. D., 119 N. W. 177.

100. **Mortgages**—Deed Absolute.—A transaction between a trustee and the cestui que trust, arising out of a deed absolute on its face though only a mortgage in fact, held presumptively fraudulent, requiring the trustee to show that the transaction was fair.—Gassert v. Strong, Mont., 98 Pac. 497.

101.——Foreclosure.—Where mortgaged premises were subject to a lease for a term of years, an advertisement of foreclosure sale should state that the premises were to be sold subject to the lease, and describe the same.—Carter v. Builders' Const. Co., 113 N. Y. Supp. 316.

102.——Fraud.—In an action by a mortgagor to set aside all transfer of his interest in the mortgaged premises to the mortgagee, evidence held to show fraud on the part of the mortgagee, justifying the setting aside of the transaction.—Gassert v. Strong, Mont., 98 Pac. 497.

103.——Right of Purchaser to Contest.—Where the purchaser of mortgaged property at a sale was allowed to show on foreclosure the amount due on the mortgage debt at that time, he cannot complain that he was not allowed to contest the amount due.—Greist v. Gowdy, Conn., 71 Atl. 555.

104. **Municipal Corporations**—Contract for Street Improvements.—A provision, in a contract for the construction of a street, that the contractor might appropriate the surplus dirt from the street did not render the proceeding or the contract void on collateral attack.—Martindale v. Incorporated Town of Rochester, Ind., 86 N. E. 321.

105.——Encroachments on Alleys.—Where encroachments are erected on an alley in pursuance of lawful permits from the city, any damage or inconvenience resulting to the other property owner therefrom is damnum absque injuria, and affords no ground for injunction.—Fralinger v. Cooke, Md., 71 Atl. 529.

106.——Nature.—Cities and towns are in a sense different from counties, having powers, functions, duties, and liabilities conferred by charter, though they are in a restricted sense governmental agencies.—Wittkowsky v. Board of Com'rs of Jackson County, N. C., 63 S. E. 275.

107.——Prescription.—Where a building has openly and obviously encroached on a public street for over 20 years, the right by prescription may be obtained to maintain the building in that condition as against adjoining owners by limitation.—556 & 558 Fifth Ave. Co. v. Lotus Club, 113 N. Y. Supp. 886.

108.——Public Improvements.—While the board of trustees of a town cannot delegate its power to authorize public improvements, it may delegate the performance of ministerial duties connected with the making of such improvements.—Martindale v. Incorporated Town of Rochester, Ind., 86 N. E. 321.

109.——Shed Over Sidewalk.—Under a permit from a city to build a shed over a sidewalk, billboards, which were no part of the shed, but intended only for advertising purposes, could not be attached to the shed.—C. J. Sullivan Advertising Co. v. City of New York, 113 N. Y. Supp. 893.

110. **Names**—Idem Sonans.—Names "Minnie E. Tilter" and "Minnie E. Tiller" held idem sonans.—Kelly v. Kuhnhausen, Wash., 98 Pac. 603.

111. **Navigable Waters**—Conveyance of Littoral Rights.—An equitable owner or claimant of government lands in Alaska on the sea shore may convey his littoral rights to an individual or corporation to enable such grantee to erect or maintain a wharf for the benefit of commerce and navigation.—Decker v. Pacific Coast S. S. Co., U. S. C. C. of App., Ninth Circuit, 164 Fed. 974.

112.——Obstructions.—One constructing and maintaining a boom in a navigable river held required in order to escape responsibility for the destruction of the property of another to move it to a place of safety at his own expense.—Kuhnis v. Lewis River Boom & Logging Co., Wash., 98 Pac. 655.

113. **Negligence**—Places Attractive to Children.—A railroad track in the open country is not attractive or alluring to children within the exception to the rule that a railroad company owes a trespassing child no greater duty to discover its peril than it owes to an adult trespasser.—Palmer v. Oregon Short Line R. Co., Utah, 98 Pac. 689.

114. **Partition**—Res Judicata.—Where, pending suit to quiet title, one of two tenants in common sold a part of the common property to B and appropriated the entire price, the amount so sold was properly deducted from his share in partition.—Snowdon v. Anderson, Wash., 98 Pac. 610.

115. **Patents**—Change of Form.—The making in one piece of that which was formerly made in two, or in two pieces what was made in one when the function of the device is not changed is not invention but the work of the mechanic only.—H. Mueller Mfg. Co. v. A. Y. McDonald & Morrison Mfg. Co., U. S. C. C., N. D. Ia., 164 Fed. 991.

116. **Pleading**—Exhibits and Complaints.—A variance between exhibits and the allegations of the complaint is waived by failure to demur or to move for judgment on the pleading and by trying the case on the merits.—Clark v. Cross, Wash., 98 Pac. 607.

117. **Post Office**—Offenses Against Postal Laws.—A letter mailed in furtherance of a scheme to defraud, in order to support an indictment under

Rev. St. Sec. 5480, need not in itself be effective to execute such scheme, but it is sufficient if it was designed for that purpose or to assist in it.—Lemon v. United States, U. S. C. C. of App., Eighth Circuit, 164 Fed. 953.

118. **Principal and Agent**—Presumed Authority.—A landlord's agent, having authority to rent property, is presumed to have like authority to give to the tenant notice to quit.—Benton v. Stokes, Md., 71 Atl. 532.

119.——Proximate Cause of Injury.—The negligence of a mining company's superintendent in maintaining a shaft in a dangerous condition, and permitting its use by a workman furnished by another company, held "misfeasance," for which the superintendent was liable.—Hagerty v. Montana Ore Purchasing Co., Mont., 98 Pac. 643.

120.——Ratification.—It is not necessary for the application of the rule that a party by accepting the benefits of an unauthorized contract, ratifies the entire transaction that he should have had knowledge of all the terms and conditions of the transaction when he took advantage of the contract.—Moyers v. Fogarty, Iowa, 119 N. W. 159.

121. **Process**—Amended Complaint.—Where respondents have been brought under the jurisdiction of the court by proper service, the jurisdiction is not lost by an amendment of the complaint whereby a necessary jurisdictional allegation is inserted.—Goodman v. City of Ft. Collins, U. S. C. C. of App., Eighth Circuit, 164 Fed. 970.

122.——Defects.—Where a summons and complaint were issued against R. L., R. W. L., and others, and the return showed service upon R. L., W. R. L., and others, but was amended to correspond with the summons, the amendment cured the defects, and a motion to quash the service was properly overruled.—Lewis v. Collier, Ala., 47 So. 790.

123. **Public Lands**—Right of Homestead Settler.—The fact that a settler who is actually residing on public land with the bona fide intention of acquiring title thereto under the homestead law purchased his improvements from a prior settler does not affect his right to so acquire the land.—Trodick v. Northern Pac. Ry. Co., U. S. C. C. of App., Ninth Circuit, 164 Fed. 913.

124. **Quieting Title**—Sale of Real Estate.—The lien of a judgment creditor of an heir as to real estate sold by the administrator without notice to the creditor could be determined in an action by the purchaser to remove a cloud or quiet title.—Yoder v. Kalona Sav. Bank, Iowa, 119 N. W. 147.

125. **Railroads**—Duty Toward Trespassers.—A railway company owes a trespasser no greater duty than any other owner of property would owe in the same circumstances.—Palmer v. Oregon Short Line R. Co., Utah, 98 Pac. 689.

126.——Negligence.—The presumption of negligence arising from proof of communication of fire from locomotive having been rebutted, held, that plaintiff cannot recover without showing actual negligence.—Osborn v. Oregon R. & Navigation Co., Idaho, 98 Pac. 627.

127. **Removal of Causes**—Suits Arising Under Federal Laws.—An action against a corporation created by an act of congress and two of its employees for negligence is, as to defendant, a suit arising under the federal constitution or laws within the removal provisions of Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508).—In re Dunn, U. S. S. C., 29 Sup. Ct. 299.

128. **Schools and School Districts**—School Buildings.—The proper procedure for the erection of a new school building upon an existing site is by petition to the township trustee and an appeal from him to the county superintendent.—Brandt v. State, Ind., 86 N. E. 337.

129. **Specific Performance**—Evidence as to Contract.—Specific performance of a contract between aged devisee and her children, under which the most of the property left to the widow is to be surrendered, will not be enforced unless evidence is clear.—In re Panko's Estate, Neb., 119 N. W. 224.

130.——Mutuality of Remedy.—A contract to render personal services, not being enforceable against the promisor, will not be enforced against the other party.—Jolliffe v. Steele, Cal., 98 Pac. 544.

131.——Offer to Perform.—In a suit for specific performance of a contract to convey land, it was sufficient for plaintiff to offer to perform without depositing the price in court.—Anse La Butte (Le Danois) Oil & Mineral Co. v. Babb, La., 47 So. 754.

132. **Statutes**—Conclusiveness.—An enrolled statute imports absolute verity and is conclusive, unless the legislative journals show beyond all doubt that the act was not passed regularly.—Stephens v. Board of Com'rs of Lapette County, Kan., 98 Pac. 790.

133.——Construction.—The intention of the legislature must be determined from the language actually used, interpreting it according to its fair and obvious meaning.—State v. Montello Salt Co., Utah, 98 Pac. 549.

134. **Street Railroads**—Care of Passengers.—Whether a street car conductor exercised proper care for the safety of a passenger so intoxicated as to be unable to take care of himself held for the jury.—Benson v. Tacoma Ry. & Power Co., Wash., 98 Pac. 605.

135.——Negligence.—Even if a four-year-old child could not be guilty of contributory negligence, in an action against a street railroad for her death by being struck by a car, plaintiff was not excused from showing her conduct and situation when she was injured as bearing upon the company's negligence.—Morse v. Consolidated Ry. Co., Conn., 71 Atl. 553.

136. **Taxation**—Exemptions.—An exemption from taxation or the right to a particular form or method of taxation is a personal privilege and inalienable by the grantee.—State v. Great Northern Ry. Co., Minn., 119 N. W. 202.

137.——Recovery of Excessive Payments.—Taxpayer held not entitled to a reaudit of its claim for a refund, where it had accepted the refund allowed, and acquiesced therein for three years.—People v. Board of Sup'rs of Erie County, N. Y., 86 N. E. 348.

138. **Towns**—Power to Issue Bonds.—Bonds issued by a township to aid the construction of a railroad cannot be sustained under Code Sec. 1996, authorizing county commissioners to subscribe for railroad stock to aid in the completion of railroads.—Wittkowsky v. Board of Com'rs of Jackson County, N. C., 63 S. E. 275.

139. **Trial**—Non-Suit.—The failure of defendant to introduce evidence after the denial of his motion for non-suit, and a motion by plaintiff for a directed verdict, held to submit the case to the court.—Patty v. Salem Flouring Mills Co., Ore., 98 Pac. 521.

140. **Trusts**—Resulting Trusts.—A resulting trust, being one which results by implication or construction of law, does not fall within the statute of frauds, and may be established by parol evidence.—Pittock v. Pittock, Idaho, 98 Pac. 719.

141. **Vendor and Purchaser**—Action for Rescission.—In equity, if the purchaser has been wronged by a mistake as to the interest of his grantor, relief will be granted, and the deed will be treated as an executory contract to convey, and rescission thereof may be decreed.—Lewis v. Mote, Iowa, 119 N. W. 152.

142.——Construction of Contract.—A contract to sell city lots subject to an encroachment, if any, not to exceed one inch, on a street, held to relate to an unlawful encroachment, which the public authorities could remove.—556 & 558 Fifth Ave. Co. v. Lotus Club, 113 N. Y. Supp. 886.

143.——Executory Contract.—That a vendor in an executory contract has no title to convey affords no ground for rescission before the purchaser has performed and is entitled to demand a deed.—Hanson v. Fox, Cal., 99 Pac. 489.

144. **Wills**—Construction.—Where the words of a will in the first instance indicate an intent to make a clear gift, such gift is not to be cut down by any subsequent provisions which are of indefinite or doubtful expression.—In re Richards' Estate, Cal., 98 Pac. 52.

145. **Work and Labor**—Farm Leases.—If farm tenants under an agreement for a crop rental abandon the premises, they cannot recover for plowing the land.—Smart v. Burquoin, Wash., 98 Pac. 666.